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No. 778

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

JOHN A. POTUCEK, Trustee of WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt,
Petitioner,

vs.

CORDELERIA LOURDES and CORDELERIA SANTA INES,
Respondents,

In the Matter of DONALD L. WILSON and MARGIE I. WILSON and WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, John A. Potucek, Trustee of Wilson Sugar and Elevator Company, Inc., Bankrupt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on November 1, 1962 (Appendix C, p. A21). The judgment af-

firmed the ruling made by the United States District Court for the District of Kansas which in turn reversed the Referee of such Court before whom the matter was tried. Under such judgment the Respondents can reclaim property in the hands of the Trustee on the theory that Respondents did not realize they were doing business with the Petitioner but rather thought they were doing business with another.

The litigation arises out of the Bankruptcy Act, jurisdiction being founded on the Federal Constitution and the Federal law. The estate of the Bankrupt was being administered by a trustee duly appointed in the United States District Court for the District of Kansas.

OPINIONS BELOW.

The Referee's Findings of Fact, Conclusions of Law and Opinion (Appendix A) are not reported. The memorandum opinion of the United States District Court for the District of Kansas reversing the judgment of the Referee (Appendix B) is not reported. The opinion of the Court of Appeals affirming the District Court (Appendix C) is reported at ..... F.2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on November 1, 1962 (Certified Record from Clerk of Court of Appeals, pg. 4).* A Petition for Rehearing *En Banc* was filed on November 21, 1962 (R. 5). On November 30, 1962, the Court of Appeals denied the Petition for Rehearing *En Banc* and also denied on the same day the

*References in this section are all to such certified record.

Petition for Rehearing (R. 7). The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* 1254 (1).

QUESTIONS PRESENTED.

1. A question presented is whether a person aggrieved by the judgment of a Referee in Bankruptcy may have a petition for review heard and determined by the United States District Court when such petition for review is not filed within ten days from the date of the Referee's order or within an extension obtained by order on a motion itself filed within ten days of the Referee's order, all as provided in 11 *U.S.C.* 67 (c).

2. A further question involved concerns the application of *Rule 52 (a) of the Federal Rules of Civil Procedure*, 28 *U.S.C.*, and *General Order 47* (11 *U.S.C.* following Sec. 53), to petitions for review of orders of a Referee by the District Court and by the Court of Appeals on appeal. Such second question presented is whether the Court of Appeals, in overturning the Referee's Findings of Fact (after proceedings where the witnesses were heard and their testimony tested by the Referee against the documentary evidence) in the face of *Rule 52 (a)* and in the face of *General Order 47* misapplied such rule and order and sought to modify the plain provisions of such rule and order by application of another principle pursuant to which the Court of Appeals held that the Referee could not disbelieve witnesses heard only by the Referee.

CONSTITUTIONAL PROVISIONS, STATUTES, FEDERAL RULES OF CIVIL PROCEDURE AND GENERAL ORDERS INVOLVED.

Article I, Section 8, of the *Constitution* provides in pertinent part,

> "To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States."

Article III, *Section* 2 of the *Constitution* provides in pertinent part,

> "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *"

11 *U.S.C.* 67. (c) provides,

> "(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof *or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow,* file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest." (Our emphasis.)

Rule 52 (a) provides,

> "Rule 52. Findings by the Court
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

General Order 47 provides,

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

STATEMENT.

Three bankruptcy estates were consolidated by the Referee duly appointed and acting under the United States District Court for the District of Kansas (R. 3-4).* The Respondents, Mexican corporations and manufacturers of twine and twine products, had shipped quantities of twine to the Bankrupt, which twine was in the hands of the Trustee and which the Respondents by reclamation petitions sought to obtain. There are two Respondents, Cordeleria Lourdes and Cordeleria Santa Ines (hereinafter

*References herein are to the record printed for the court below.

referred to as "Lourdes" and "Ines"), but their situation in all respects pertinent herein is the same. Each had shipped a quantity of twine to the Bankrupt, a part of which was paid for and a part of which remained unpaid for at the time of bankruptcy, the portion unpaid being represented by time drafts which were accepted by the Bankrupt and which at the instance of the Bankrupt had been extended in far as the original time for payment was concerned.

Respondent Lourdes asserted in its reclamation petition that it had sent four invoices, the first of which and one-half of the fourth of which were paid, but the unpaid invoices aggregated $34,500.00. Respondent Ines asserted in its reclamation petition that it had shipped a quantity of twine with a sight draft of $20,150.00 attached (which sight draft was paid) and with a time draft in an equal amount—$20,150.00 which was unpaid. Both Respondents asserted that the twine they shipped was in the hands of the Trustee. Both Respondents asserted that under their rules and regulations (the rules and regulations of Cordeleros de Mexico, a Mexican trade association whose purpose was to police the twine industry and to fix and maintain prices), they could deal only with (and thought they were dealing with) Midcontinent Twine Co., Inc., of Plattsmouth, Nebraska, and it was only after bankruptcy that they ascertained that they were not dealing with Midcontinent Twine Co., Inc. (R. 4-6, 23-24).

The Trustee, Petitioner herein, answered, admitting that he had in his custody and control twine which was shipped by the Respondents, but denied any right in the Respondents to reclaim such twine. Petitioner asserted that the Respondents knew the Bankrupt, Wilson, with whom they dealt, and shipped the twine to Wilson under an arrangement whereby Wilson accepted time drafts so that Respondents meant to, and actually did, extend credit

to Wilson without any security such as a conditional sale, chattel mortgage, or otherwise (R. 35-38).

At the hearing many exhibits were received. It appeared therefrom that Midcontinent Twine Co., Inc., of Plattsmouth, Nebraska, entered into a contract with the Bankrupt, Wilson, under which all its rights to the brand name—Midcontinent—and all its rights as an importer of twine from Mexico were sold to the Bankrupt, Wilson (R. 87, 19-22).

The twine sent was on orders signed by the Bankrupt, Donald L. Wilson, and usually on stationery of his corporation, Wilson Sugar & Elevator Company, Inc. The twine was shipped with drafts attached and was invoiced. The drafts were to Donald L. Wilson, Wilson Sugar & Elevator Company or to Donald L. Wilson—Midcontinent Twine Company, with the invoices corresponding to the drafts. All the time drafts used were extended by the Respondents at the request of Donald L. Wilson (R. 26-33, 83-90, 115-128, 91-97, 159-163, 8-17, 135-157).

The parties stipulated before the Referee to correspondence with the American Consul to determine the Mexican law pertaining to twine to be shipped to the United States. The American Consul answered and advised that there are no Mexican laws governing imports into the United States since such matters come under the sovereignty of the United States Government, which through its bureau of customs, controls the inward flow of products. There are no quotas and no import duties on the importation of twine and therefore no import permits are required. The Consul further advised that on the Mexican side there is an export permit, that is, permission from the Mexican Government to ship products out of Mexico. These export permits apply to twine and are issued to

the Mexican Mills and are binding upon the Mills and not upon a buyer in the United States. Further advising, the Consul stated that there was a third instrument which affects the American buyer—in December of 1953 several mills in Mexico formed an association known as the Cordeleros de Mexico, the purpose of the organization being to establish standards of quality for twine and maintenance of uniform price schedules for twine, thus preventing cutthroat competition detrimental to the industry. The association inspects the products of the various mills, vouches for quality standards, registers all orders and recommends approval of orders to the representative of Industry and Commerce.

The association reviews all sales contracts proposed by the various mills and as the industry's representative exercises its right to sell to whom it pleases and either approves or disapproves the proposed contract. Approved buyers are registered with the organization and its member mills are not allowed to sign contracts with buyers who are not registered. Contracts are not transferable. The manufacturer of twine may not sign a contract with a buyer who is not registered, and may not ship twine without the approval of the association. This is a requirement of the association and not a Mexican law but Mexican law requires an export permit and the mill can not obtain an export permit without association approval. Without a contract approved by the association the seller could not obtain approval for a shipment and the buyer would not receive any twine and perhaps not a new contract. The courts enter the matter very rarely since no American buyer would bring suit in Mexico where the process could be endless and he would certainly lose; if he sued in the American courts, the judgment would not be binding upon the Mexican mill. The government per-

mits the association to have this power. If it did not exercise it, the government would probably step in, since it is interested in standard quality and uniform prices (R. 39, 41-45).

In addition to the considerable number of exhibits introduced and received, the Referee heard two witnesses, the managers of each of the two Respondents who were the Petitioners before the Referee. Both of such managers testified that they actually met Donald L. Wilson who came to Mexico in the company of Tritsch who had owned Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska. Both reluctantly testified that they stamped on one side of the bales of twine "Made especially for Donald L. Wilson, Riverdale, Kansas" and on the other side, "Made especially for Midcontinent Twine Company, Riverdale, Kansas". Both managers also testified that they could export twine under the rules of their own association only with a registered exporter and the only registered exporter was Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska. Both testified that they thought they were dealing with Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska, even though the twine was sent to the bankrupt Wilson and the drafts were made to him or one of his companies (R. 79-102).

The Referee, on September 12, 1960, after considering the testimony heard by him and the various and sundry exhibits, rendered his decision (R. 45-52), (Appendix A). He concluded that the real legal question in issue was whether the Trustee had title to the twine or whether the Respondents had a lien on the twine shipped by them to the bankrupt. He determined that no procedure was used by the Respondents to retain any title or any security interest in the twine and that the Respondents did not sell the twine for cash but rather on open account

via time drafts. He therefore concluded that since the twine had been delivered, the time drafts attached had been accepted and the time of the payment thereof extended, that title was in the bankrupt and the reclamation petitions had to be denied (R. 49-52).

Both Respondents filed a petition for review. First, however, each of the Respondents, on September 22 and within 10 days of the Referee's order, filed a motion to extend the time for filing of petitions for review to October 12, 1960 (R. 52).

The United States District Court entered its order extending the time for filing petitions for review, the order being entered on the same date as the filing of the motion—September 22, 1960, and the extension running to October 12, 1960 (R. 54).

On October 12 both Respondents filed a second application for enlargement of time to file a petition for review and the Court on the same day, October 12, entered its order again extending the time for filing such petitions for review (R. 53-54).

Both Respondents filed a petition for review within such second extension (R. 59-60).

After reviewing the record and without hearing any additional testimony or receiving any additional exhibits, the United States District Court for the District of Kansas on October 23, 1961, entered its memorandum opinion reversing the Referee (Appendix B).

In that decision the District Court determined, based on *Nicholas* v. *Davis*, 204 F.2d 200, 10th Circuit (1953) that the Referee had to believe the managers of the Respondents when such managers testified that they did not realize that they were dealing with a different entity

than the registered importer for Mexican twine, the Mid-continent Twine Company, Inc., of Plattsmouth, Nebraska. Therefore the Court concluded that the Referee's finding was improper and since the Respondents had a right to pick with whom they dealt, they had a right to reclaim their merchandise (R. 62-71).

The Trustee timely filed a notice of appeal which was heard by the United States Court of Appeals, 10th Circuit. Such Court in its opinion filed November 1, 1962 (Appendix C) determined that the 1960 amendment to the *Bankruptcy Act*, 11 *U.S.C.* 67 (c) did not restrict the jurisdiction of the District Court to hear petitions for review, if the court so desired, even though the petition for review was not filed within 10 days of the Referee's order and even though the petition for review was not filed within the time as extended by the court on a motion itself filed within 10 days of the Referee's order. Such Appellate Court also determined that the clearly erroneous rule (*Rule* 52 (a) of the *Federal Rules of Civil Procedure* and *General Order* 47 of the *General Orders in Bankruptcy*) applied to the findings of the Referee. However, it further held that the District Court was correct in applying the rule of *Nicholas* v. *Davis*, 204 F.2d 200, 10th Circuit (1953); that the Referee had to believe the testimony of the two managers of the Respondents; and that pursuant to such rule the findings of the Referee were clearly erroneous and the judgment of the District Court must, therefore, be affirmed.

REASONS FOR GRANTING THE WRIT.

I.

The Court Below, in Construing 11 U.S.C. 67(c) Determined a Question of Federal Law Arising under the Bankruptcy Act (Which Has Not Been, But Should Be, Decided by This Court) in a Manner at Variance with the Plain Words of the Section and the Legislative History Thereof and in So Doing Came in Conflict, at Least in Principle, with a Decision of the Court of Appeals for the 7th Circuit.

The statute in issue (p. 4, *infra*) covers all review proceedings arising under the Bankruptcy Act. It is therefore of the utmost importance that such statute receive the same construction in our many Federal courts so that review in bankruptcy actions is uniform. The section has already caused our Federal courts a great deal of concern. Before its recent amendment in 1960, decisions dealing with such section from our various Federal courts were at odds in several particulars. This conflict was resolved by this Court in *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 87 L. Ed. 146 (1942). The section before its amendment in 1960 provided (see footnote 2 to this Court's decision in 317 U.S. at 145),

> "Section 39(c), 'A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing * * *'"

The conflict among the circuits was recognized as this Court stated, 317 U.S. at 145,

> • • • "A conflict of circuits as to whether the ten-day period for filing a petition for review of a commissioner's order was a limitation on the power of the reviewing court to act or on the right of an aggrieved party to appeal, impelled us to grant our writ."

This Court then in such decision reviewed the history of review proceedings beginning with the original *General Order in Bankruptcy XXVII* under which there was no time limit, the revocation of such order, and concluded, 317 U.S. 152,

> "Section 39(c) was intended to establish definitely and clearly the proceeding for review of a referee's order in the interest of certainty and uniformity but the legislative history reveals no intention to change the pre-existing rule as to power."

Therefore, this Court concluded, 317 U.S. 153,

> • • • "We do not think Section 39(c) was intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period. The power in the bankruptcy court to review orders of the referee is unqualifiedly given in Section 2(10). The language quoted from Section 39(c) is rather a limitation on the 'person aggrieved' to file such a petition as a matter of right."

Thus, this Court, in construing the review section of the Bankruptcy Act, resolved the conflict in the circuits and made certain that uniformity would prevail.

Congress, however, was not satisfied with such construction. In 1960 it amended *Section* 39(c) of the *Bank-*

ruptcy Act (11 *U.S.C.* 67(c)). The statute as now amended is set forth herein at page 4. The legislative history of the new enactment is set forth in Appendix D as taken from 2 *U. S. Code, Congressional and Administrative News,* 86th Congress, Second Session, 1960, pp. 3194-3197. It clearly appears therefrom that the Congress meant to change review proceedings from the rule this Court determined in the *Pfister* case, *supra,* and to make it clear that there should be no uncertainty as to the finality of a referee's order under the doctrine that a District Court may entertain an untimely petition for review. The purpose of the enactment was quite obviously to fix a definite period of time within which an application for review had to be filed—otherwise the Referee's order would be final. The amendment was recommended by the administrative office of the United States courts. As set forth in its recommendation (Appendix D, p. A34):

> • • • "that unless the person aggrieved shall petition for review of such order within such 10-day period, or an extension thereof, the order of the referee shall become final." (p. 3195).

The explanation of the bill puts the matter concisely (Appendix D, p. A36):

> "Uncertainty as to the finality of a referee's order now exists because of the holdings of some courts that a bankruptcy court may entertain an untimely petition for review, even in the absence of an extension of time. In view of this an amendment to section 39c is needed that will fix a definite period of time within which an application for review must be filed. The bill would amend section 39c so as to make it clear that the petition for review must be filed within the prescribed 10-day period or within such extended time as the court may allow upon petition for extension filed within such 10-day period." (p. 3196).

The Respondents herein filed petitions for review but did not file their petitions within ten days and did not file their petitions within an extension itself granted on a motion filed within ten days of the referee's order. The referee's order, therefore, as contemplated by the Congress in its amendment, was final. The Court below, however, concluded that the new amendment did not limit the discretionary power of a district court to receive and grant a petition for review and relied for its determination on *Pfister* v. *Northern Illinois Finance Corp., supra.* In so determining, confusion concerning review of referee's orders settled by the *Pfister* case has been raised again and the determination of the Congress as to the time for finality of referee's orders has been frustrated.

The United States Court of Appeals for the 7th Circuit has considered the same statute, 11 *U.S.C.* 67(c) in *In re Acme Furnace Fitting Co.*, 302 F.2d 318 (1962) (cert. den. 9 L. Ed. 2d 88). The same situation presented to the court below was not involved, but the 7th Circuit was concerned with exactly the same statute and exactly the same question, *i. e.*, the finality of referee's orders. The 7th Circuit stated, 302 F.2d at 320,

> "The last italicized sentence shown above was added by the 1960 amendment. It makes clear that a petition for review must be filed within the prescribed ten day period or within such extended time as the court may allow upon a petition for such extension filed within the same ten day period."

Clearly, the decision of the 7th Circuit is, at the very least, in principle opposed to the determination made by the court below. Additionally there have been several district court decisions construing the new amendment to 11 *U.S.C.* 67(c). These decisions, set out in a footnote hereto, indicate clearly that such courts could no longer

find any inherent discretionary power in the district judge to grant a petition for review. The decisions succinctly state that "final" means "final", and if no petition for review is filed within ten days or within an extension obtained upon a motion itself filed within ten days of the referee's order, that such order is necessarily final.*

We submit it is imperative that this Court determine with finality this important question, arising under the Federal Bankruptcy Law to establish uniformity among our many Federal courts in this important area. The decision of the court below begins anew the conflict and confusion in review proceedings. Such question should be set at rest, which can only be done by this Court.

II.

There Is a Compelling Need for This Court to Clarify the Standards of Review Set Forth in Rule 52(a) and Its Counterpart in Bankruptcy Proceedings—General Order 47. The Required Standards of Appellate Review Should Be Stated to Make It Clear That a Departure Therefrom, As Attempted by the Court Below, Is Unauthorized and Unwarranted.

The court below in its opinion (Appendix C at p. A27) recognized the conflict in the Circuits in the application of the clearly erroneous rule to either the de-

*In re Watkins, 197 F. Supp. 500, W.D. Va. (1961); In re Lawson, 201 F. Supp. 710, W.D. Va. (1962); In re Middletown Packing Co., 199 F. Supp. 657, D. Conn. (1961); In re Silver, 199 F. Supp. 836, S.D. N.Y. (1961); In re Victor P. Danenza, 200 F. Supp. 694, E.D. N.Y. (1962); In re Harnik, 207 F. Supp. 325, W.D. Ark. (1962); and note in accord 2 Collier on Bankruptcy, 14th Ed., Sec. 39.01, p. 83, and 8 Remington on Bankruptcy, 1962 Supp., Pars. 3406 and 3407, pp. 34-35.

cision of the district court or the decision of the referee.* It determined correctly, we submit, that both the district court and the Court of Appeals must accept the fact findings of the referee unless they were clearly erroneous. *Rule 52(a)* and *General Order No. 47* set forth herein at page 5 amount to the same thing. Findings of the trier of the facts (in bankruptcy matters, the referee) must be accepted unless clearly erroneous.

The clearly erroneous rule has been defined for the guidance of the Courts of Appeals by this Court in *United States* v. *United States Gypsum Company*, 333 U.S. 364, 92 L. Ed. 746 (1948), this Court stating, at 395,

> • • • "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This Court recognized, along with such definition, that the evaluation of testimony was for the trier of the facts and that only where such testimony was in conflict with contemporaneous documents was an appellate court privileged to give it little weight. As this Court put it, at page 396,

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*Such conflict, as note *In the Matter of Herman Tabibian*, 289 F.2d 793, 2 Cir. (1961); *Phillips* v. *Baker*, 165 F.2d 578, 5 Cir. (1948); *In re Newman*, 126 F.2d 336, 6 Cir. (1942); *In re Skrentny*, 199 F.2d 488, 7 Cir. (1952); *Gross* v. *Fidelity & Deposit Company of Maryland*, 302 F.2d 338, 8 Cir. (1962); *Lines* v. *Falstaff Brewing Co.*, 233 F.2d 927, 9 Cir. (1956), cert. den. 352 U.S. 893, 1 L. Ed. 2d 88; *Forbush Co.* v. *Bartley*, 78 F.2d 805, 10 Cir. (1935); *In the Matter of the Arbycraft Co.*, 288 F.2d 553, 3 Cir. (1961); *Mountain Trust Bank* v. *Shifflett*, 255 F.2d 718, 4 Cir. (1958); *Stewart* v. *Ganey*, 116 F.2d 1010, 5 Cir. (1941); *Carr* v. *Southern Pac. Co.*, 128 F.2d 764, 9 Cir. (1942); has not been, but should be, resolved by this Court.

> "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we can not under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."*

The court below added a standard to the clearly erroneous rule provided for by *Rule 52(a)* of the *Federal Rules of Civil Procedure* and *General Order No. 47 in Bankruptcy*. Thus in its opinion (Appendix C, p. A28) it called attention to the evidence of the two managers of the Respondents who testified and determined therefrom that the principles pronounced in *Nicholas* v. *Davis*, 204 F.2d 200, 10th Circuit (1953), were applicable. The principle thus used was set forth in *Nicholas* v. *Davis*, at page 202,

> "When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstance reflected on the record casts doubt on its verity, then under the principles laid down in Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 215-220, 51 S. Ct. 453, 75 L. Ed. 983, it may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination by the jury."

Such principle so enunciated and applied to modify the clearly erroneous rule by the court below was bor-

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*For other decisions of this Court involving and defining the clearly erroneous rule, see *McAllister* v. *United States*, 348 U.S. 19, 99 L. Ed. 20 (1954); and *Commissioner* v. *Duberstein*, 363 U.S. 278, 4 L. Ed. 2d 1218 (1960).

rowed from this Court's determination in *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U.S. 209, 75 L. Ed. 983 (1931), which decision, of course, came long before the adoption of the Federal Rules of Civil Procedure and thus long before the creation of the clearly erroneous rule. It can therefore have no application in the present proceedings and should not be relied upon to modify the clearly erroneous rule as set forth and construed by this Court since the adoption of the Federal Rules of Civil Procedure.

The importance of the credibility rule necessarily involved in applying "clearly erroneous" can not be overstated. Due regard must be had for the trier of the facts who alone saw the witnesses, heard the testimony, and therefore could weigh it as compared with the documentary evidence. This Court in a decision in an entirely different area has very recently recognized the necessity of leaving credibility with the trier of the facts, noting that the trier may believe or disbelieve the testimony of a witness and determine that such testimony is true or that the opposite constitutes the true state of affairs. Thus in *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 7 L. Ed. 2d 829 (1962), at 832, this Court observed,

> * * * "As we said in the Universal Camera Case: '* * * The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.' 340 U.S. at 496.
>
> "For the demeanor of a witness * * * 'may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that

he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.' Dyer v. Mac Dougall, (C.A. 2, N.Y.) 201 F.2d 265, 269."

We submit that the Court of Appeals for the 2nd Circuit has correctly stated the principles applicable in bankruptcy proceedings, while recognizing the importance of the trial court's determination of the credibility of witnesses. Thus in *Simon* v. *Agar*, 299 F.2d 853 (1962), such court in a *per curiam* opinion observed,

> "It is too well settled to require the citation of authorities that where an appeal brings up for review concurrent findings of fact by the referee and the district court, they can be set aside only if 'clearly erroneous'. See Bankruptcy General Order 47, 11 U.S.C.A. following section 53; Rule 52(a) F.R.Civ.P., 28 U.S.C.A. Particularly is this true where, as in this case, the findings involve questions of credibility of witnesses who testified before the referee."

The court below did not follow these principles. It sought to modify the clearly erroneous rule by application of a principle enunciated long before the adoption of the Federal Rules of Civil Procedure. In so doing it deviated from the standards laid down by this Court.

The evil in attempting so to tack on to the clearly erroneous rule is apparent upon even a cursory review of the facts involved in these proceedings. The question here before the referee in the first instance concerned whether the petitioning Mexican corporations, the Respondents, intended to extend credit to the bankrupt Donald L. Wilson or his companies. To determine this matter the referee received in evidence a quantity of exhibits and heard the testimony of the managers of the two Mexican corporations. Both testified that they had no idea that

they were dealing with Donald L. Wilson but, on the contrary, thought that they were dealing with Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska, which company alone had the export permit required by their trade association. The referee obviously did not believe this testimony but, on the contrary, believed its opposite. The trier of the facts was so led to believe the opposite, doubtlessly by contemporaneous writings as well as from the demeanor and manner of testifying by the witnesses. Thus in one of the contemporaneous writings (R. 163) one of the Mexican corporations wrote to the bankrupt's bank (the First National Bank in Wellington, Kansas) stating,

> "Offers Donald L. Wilson 30 days to pay for the Baler and Binder Twine shipments that we make him during the 1959-1960 twine season providing that we can *descount* the acceptance papers accepted by him and endorsed by us in a Bank of Kansas, for which we would open an account in said Bank and leave a constant balance of 5,000 Dls. or a little more in it.
>
> "We would send original Bill of lading and insurance papers to Mr. Wilson's Brokers in Houston and copies to Mr. Wilson together with the draft already endorsed, same draft that he would take it to the bank after accepting it, and the bank would take his interest, discount it, and put it in our account.
>
> Cordeleria Santa Ines, S.A, Tomis Martin."

Thereafter the twine was shipped by the Mexican corporations with sight drafts and time drafts attached, the sight drafts being obviously paid and the time drafts being accepted. The time of payment for such time drafts was extended—accomplished by a series of contemporaneous telegrams. The first (R. 127) was from Wilson

to the manager of the Mexican corporation Cordeleria Santa Ines,

> "Due to bad weather unable to move twine please give me 30 days extension on draft which is due 4-6-60. I will pay the interest. Please notify Whitney National Bank, New Orleans and tell them to notify my Bank First National Bank Wellington, Kans.
>
> Donald L. Wilson, Riverdale, Kans."

Such extension was granted, as note the next in a series of telegrams,

> "Donald L. Wilson, P.O. Box 36, Riverdale, Kansas. U.S.A.
>
> "Bank only accepts 15 day *extention* on new draft. Imperative that it is paid by April 21st. Thanks. (R. 127).
>
> Santines."

A second extension was also obtained by a telegram sent by Donald L. Wilson,

> "Cordeleria Answer Requested Attn Alfonso Martin Santa Ines S A
>
> Must request another 15 day extension on draft which is due 4-21-60. Twine is just now beginning to move. I heard you were in New York if so please come *dy* Please notify banks.
>
> Donald L. Wilson, Riverdale, Kansas." (R. 127-128).

The extension was granted, the Mexican corporation writing Wilson, stating,

> "Dear Mr. Wilson:
>
> We received yesterday a wire from your office advising that 15 days more were necessary to pick up the pending draft issued by us on your account, and immediately we got in touch with the Bank and secured the extension so you should be hearing from

them in that regards. Probably they will want to change the draft for a new one directly with you so as to keep it in date.

"All reports that we have been hearing the last two weeks are that the snow and ice is already melting and prospects are unusually good for a fine twine season. (R. 128).

Cordeleria Santa Ines S. A."

Exactly the same situation prevailed as to the other Mexican corporation. Thus before any credit was extended it received a letter from the Midcontinent Twine Company, Inc., of Plattsmouth, Nebraska (R. 140), stating,

"My Dear Friend Eduardo:

With reference to paragraph two of your letter I am very happy to note that you will ship Mr. Wilson 4,000 bales of Midcontinent on the boat February 19th—

Maynard Tritsch
Midcontinent Twine Company,
Plattsmouth, Nebraska."

Shipments of twine were made with time drafts attached, which were accepted. Wilson asked for an extension by telegram, as note (R. 157),

"Cord. Lourdes. SA. Atencion Eduardo Casares Jr.

Due to bad weather unable to move twine. Please give me 30 days extension after due date on drafts that will come due 4-11-60 and 4-19-60. I will pay interest, please notify Whitney National Bank at New Orleans and ask them to notify my bank First National Bank Wellington, Kansas.

Donald L. Wilson, Riverdale, Kansas."

This extension was granted as note a return telegram to Wilson (R. 157),.

"Retel stop Today we made 30 days extension on your drafts that will come due 4-11-60 and 19-4-60

we already instruct our bank and they will notify *Withney* National Bank and your Bank in Wellington Kans Letter Follows. Thank you.

Cordeleria Lourdes S. A."

We submit that even a casual examination of the contemporaneous writings indicates clearly why the referee believed the opposite of the testimony of the two managers of the Mexican corporations. Quite obviously they did extend credit to the bankrupt, did accept his drafts and did, at his request, extend the time of payment for such drafts. This is an illustration of how easily the rules of appellate review and the standards set forth by this Court to be used in applying the clearly erroneous rule can be lost when the creation of some other principle is attempted. We submit that the principle of *Nicholas* v. *Davis, supra*, can have no application to *Rule* 52(a) and *General Order 47 in Bankruptcy* and that even if such principle were appropriate in any case, it can have no application to the instant proceedings where the contemporaneous writings clearly show that the testimony of the witnesses is not trustworthy. This Court should ciarify the clearly erroneous rule as it applies in bankruptcy proceedings so as to obtain uniformity throughout these United States. In so doing it should point out that the Courts of Appeals can not graft new standards onto the clearly erroneous rule.

CONCLUSION.

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

MALCOLM MILLER,
Attorney for the Trustee, Petitioner.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In the matter of DONALD L. WILSON and MARGIE I. WILSON and WILSON SUGAR AND ELEVATOR CO., INC., a corporation Bankrupt	In Bankruptcy No. 4341-B-2 No. 4343-B-2

Memorandum Opinion.

STATEMENT OF FACTS.

April 25, 1960, Donald L. Wilson and Margie I. Wilson, his wife, and Wilson Sugar and Elevator Company, Inc., a corporation, were by law adjudged bankrupts.

On such date the bankrupts had in their possession in addition to other assets the property ordered from the petitioners; as follows:

Twine Material	Invoice No.	Received from	Contract Price	Amount Unpaid
4000 Bales	26	Lourdes	$18400.	$18400.
2500 "	27	"	11500.	11500.
890 "	28	"	4600.	2300.
1000 "	28	"	4600.	2300.
2875 "	1400-25	Santa Ines	34500.	17250.
186 "	1400-26	"	5800.	2900.
600 "	—	"	—	none

(25 bales of twine are not accounted for—See Receivers petition filed May 26, 1960, Docket No. 31.)

May 19, 1960, a reclamation petition was filed by each Cordeleria Santa Ines, S. A. and Cordeleria Lourdes, S. A. The Petitioners are corporations organized and existing under the laws of the United States of Mexico, with offices in Merida, Yucatan, Mexico. Both are fabricators of sisal products, including twine.

May 25, 1960, the Petitioners agreed that the Receiver might sell the twine for not less than three-fourths the cost, with valid liens to follow the proceeds of such sale.

The Receiver, John A. Potucek, filed his answer to the reclamation petitions. The Trustee adopted the answers of the Receiver and the case was heard June 9, 1960. Proposed findings of fact, conclusions of law and briefs were submitted by Petitioners and the Trustee.

The Petitioners had been doing business for sometime with Mid-Continent Twine Company, Inc., a Nebraska corporation, with its offices at Plattsmouth, Nebraska.

January 6, 1960, the bankrupt, Wilson, contracted with stockholders of and the corporation, "Mid-Continent Twine Co., Inc."

> "to purchase the brand name 'Mid-Continent' and the goodwill of the Corporation, including all the rights of the corporation as importer of twine and twine products from Mexico for the agreed price of $55000.00 * * *"

and further that

> "* * * Wilson would employ Tritsch as a salesman * * *" (Tritsch and his wife were the only stockholders of the corporation.)

The agreement further provided that the Corporation and Tritsch agree:

> "to transfer all rights to import twine and twine products from Mexico to the said Wilson, so that in the end * * * Wilson shall have the same right as an importer as * * * possessed by the Corporation."

Wilson, with minor exception, agreed until the purchase price was paid, to "import only from Mexican Mills approved by the Corporation and Tritsch".

January 8, 1960, "Mid-Continent Twine Company, Inc.," wrote letters to the petitioners advising that the sale of the Tradeword "Mid-Continent" had been made, that Tritsch would remain with the "Mid-Continent Twine Company as Vice President" and:

> "in an advisory capacity to the new management, the *new company will purchase only from mills which I approve of in writing to them* * * *" (Italics supplied).

January 15, 1960, Tritsch advised Cordelaros de Mexico S. de R. L. de l. P y C. V. Merida, Yucatan, Mexico (referred to herein as Cordelaros de Mexico), that "Mid-Continent Twine Co., Inc.," had been sold to "Mr. Donald L. Wilson, of Riverdale, Kansas * * * now the sole owner of the Mid-Continent Twine Company".

The bankrupt, Wilson, signed the same letter under the words, "I agree the above is true".

Cordeleros de Mexico, to whom the letter referred to above was addressed, is a corporation organized under Mexican law, having public and private functions. It is not a government agency, but is in fact a trade association of manufacturers of baler and binder twine and other sisal products. Its main purpose is to protect the business and financial security of its members and in carrying out this purpose, it undertakes to control the price of raw sisal, the price of manufactured sisal goods in Mexico and

even the sale price of the manufactured goods after they are shipped abroad.

The duty of obeying all of the rules and regulations of Cordeleros de Mexico and responsibility for failure to so obey rested upon the members of that organization (Chapter III, Article 18-19).

The only provision for the recision of even a part of a sale appears to be under the heading, "Obligations of the Members, Article 14-d, wherein it is provided as follows:

> (d) To include in all of their agricultural twine sales contracts abroad, a stipulation by which the buyer is obliged to respect the minimum resale prices that the Corporation has set for the respective period of sales, and let it be established that failure to comply with this stipulation is cause of rescission of the contract in part concerning the delivery of agricultural twines that still have not been shipped by the seller member."

The Petitioner, Cordeleria Lourdes sold and invoiced shipments as follows:

Date	Invoice	Material in Bales	Price
Feb. 18, 1960	25	1000	$ 4600.
"	26	4000	18400.
Feb. 26, 1960	27	2500	11500.
March 5, 1960	28	2000	9200.
Total		9500	$43700.

Drafts were drawn on the bankrupt, Wilson. Drafts for Invoice #25 and one-half of Invoice #28 in the amount of $9200. were paid by Wilson or his Corporation, Wilson Sugar and Elevator Company, Inc. The balance of the

drafts for $34500. although accepted were not and have not been paid.

The Petitioner, Cordeleria Santa Ines sold and invoiced shipments to Mid-Continent Twine Company, Riverdale, Kansas and Wilson Sugar, Oil & Elevator Company, Riverdale, Kansas, as follows:

Date	Material in Bales	Price
Feb. 25, 1960	600	$ 3630.
March 5, 1960	8500	40300.
March 29, 1960	700	3840.
Total	9800	$50770.

The bankrupt, Donald L. Wilson, instructed Santa Ines to draw drafts on Wilson Sugar, Oil & Elevator Company for the stated reason that Mid-Continent Twine Company cash payments were handled through that company. The first shipment was paid for. The last shipment was stopped in transit. One-half of the invoice for $40,300. was paid and Santa Ines holds a past due draft accepted by "Wilson Sugar, Oil & Elevator Company by Donald L. Wilson" for $20,150.

It is clear to the Court that the petitioners and Cordeleria de Mexico knew and should have known that they were dealing with Donald L. Wilson, a new company, and not with Tritsch or Mid-Continent Twine Company, Inc. They sold and shipped material to his address in Riverdale, Kansas and received partial payment from Wilson or his corporation on the materials shipped. The materials were received by Wilson and his corporation at Riverdale, Kansas.

The time for payment of certain drafts was extended by petitioners "due to bad weather" to enable Wilson "to

move twine". No agreement was made between the petitioners and the bankrupts which would retain the title to the material in petitioners.

CONCLUSIONS OF LAW.

The legal questions presented for determination by this Court are:

> Does the Trustee have title to the materials shipped by petitioners to the bankrupts?
>
> Do petitioners have a lien upon the materials shipped by petitioners to the bankrupts?

The trustee is vested by law[1] with title of the bankrupt as of the date of filing of the petition in bankruptcy.[2]

It would appear that the law applicable under the present facts as to the validity of the sale of the materials is the Kansas law.

"The validity of the contracts is governed by the applicable law of the place where the orders for purchase or sale were executed".[3] It has been stated with respect to cash sales that:

> "Strictly defined, a cash sale is one in which the title to the property and the consideration pass simultaneously. So defined, title remains in the vendor until the purchase price is paid. However, in business transactions, the term is not ordinarily used so narrowly. Williston in his work on sales, Sec. 342-3, states the modern rule as follows: 'Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is imma-

1. Sec. 70 a, Bankruptcy Act.
2. *Gross* v. *Irving Trust Co.*, 289 U.S. 342.
3. *Lyons Milling Co.* v. *Goffe & Carkner*, 46 F.2d 241 (1931).

terial whether the time of payment, or the time of delivery, or both, be postponed.' Williston states that this rule is contrary to the old rule, according to which title to property was presumed not to pass without payment or credit or delivery.

In determining whether title passes from the seller to the buyer in a sales transaction, the guiding factor is the intention of the parties. In seeking to determine the intent of the parties, the operative construction placed thereon by them is entitled to great weight. Kansas has held that the precise character of the transaction is not definitely determined by the writings of the parties and that sometimes a practical construction placed on the contract by the parties thereto is more important than its literal terms, and that when by the performance of a written contract both parties put a practical construction upon it at variance with its literal meaning, such construction will prevail over the language of the contract.

There is much in the record, we think, tending to support a finding that this was an ordinary sale of cattle without thought, intent, or express understanding that title should remain in the vendor until the purchase price was received. It is of significance that in none of the negotiations between Carr and Stephenson, resulting in the sale of the cattle to Stephenson, was the term 'cash' or 'cash sale' used by Carr. When Carr priced the cattle at $95 per head, Stephenson said, 'I will buy them myself.' Carr agreed and prepared an invoice stating that the cattle had been 'Sold to E. A. Stephenson.' There was no suggestion that title was to remain in the vendor until payment was received. Carr merely inquired how Stephenson wanted to pay for the cattle and when Stephenson replied, 'By check,' Carr suggested a draft. When the draft was dishonored, Carr agreed to payment by check. During all this time Carr apparently treated the transaction as constituting an outstanding account. Thus, in a conference with his employers after the

draft and the check were returned, he assured them that the money would 'surely come through, that it was as good as gold.' Also, after Stephenson had failed to obtain a bank guarantee of his check, Carr began to make inquiry of some Kansas friends, because, 'This is the first time when this happened that it began to dawn on me that possibly Stephenson's account was no good.'

After all this intervened, he finally came to Kansas, not primarily to repossess his employer's property, but to collect the account. It was only after all efforts to collect the account had failed that he and Stephenson arranged to sell the cattle. Even then he agreed that Stephenson should have any overage above $95 per head resulting from the sale."[4]

It has also been held concerning sales F. O. B. that:

"This conclusion is in harmony with our holdings that where the contract provides for a sale F.O.B. the point of destination, the title is generally held not to pass in the absence of a contrary intention between the parties, until the goods have been delivered at the point designated. (Brewing Association v. Hipp, 6 Kan. App. 730, 50 Pac. 956; Hurst v. Manufacturing Co., 73 Kan. 422, 85 Pac. 551; Wing v. Mid-Continent Seeds, 170 Kan. 242, 225 P.2d 78; State of Oklahoma ex rel., v. H. D. Lee Co., 174 Kan. 114, 254 P.2d 291; Custom Built Homes Co. v. State Comm. of Rev. and Taxation, 184 Kan. 31, 334 P.2d 808)" See also, Hunter v. Kramer, 71 Kan. 468, 80 Pac. 963, wherein it was said:

"* * * The rule, as stated at page 1050 of volume 24 of the American and English Encyclopedia of Law, is as follows:

"If by the terms of the contract the seller is required to send or forward or deliver the goods to the buyer. the title and risk remain in the seller until

4. *Winter* v. *Miller*, 183 F.2d 151 (1950).

the transportation is at an end or the goods are delivered in accordance with the contract, after which time the title is vested in the buyer."[5]

We can only conclude that delivery of the material having been completed, the time for payment having been extended, the title to the property on the date of bankruptcy was in the bankrupts. The petitioner's reclamation petitions will be denied. The title and possession to the materials in question, properly rests in the trustee. The petitioners do not have a lien on the property.

IT IS SO ORDERED

(Signed) Wesley E. Brown
Wesley E. Brown
Referee in Bankruptcy

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5. *Rodgers* v. *Arapahoe Pipe Line Co.*, 185 Kan. 424, 431, 432 (1959). See also, *Custom Built Homes Co., Inc.*, v. *State of Oklahoma Comm. of Rev. and Taxation*, 184 Kan. 31 (1959).

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN THE MATTER OF DONALD L. WILSON and MARGIE I. WILSON and WILSON SUGAR AND ELEVATOR COMPANY, INC., a Corporation, Bankrupt.	In Bankruptcy No. 4341-B No. 4341-B-2

Memorandum Opinion.

This matter comes to the District Court upon the consolidated petitions of Cordeleria Lourdes and Cordeleria Santa Ines for review of the Referee's order denying their petitions for reclamation.

The petitioners are corporations organized and existing under the laws of Mexico, with offices in Merida, Yucatan, Mexico. Both are manufacturers of sisal products, including twine.

A presentation of the facts regarding the merits of the Referee's refusal to allow petitioners to reclaim certain twine products are as follows:

Mexican law vests control over twine exports in the Secretary of Industry and Commerce. By order of the Secretary exports of twine requires permits signed by both the Secretary and Cordeleros de Mexico, S. de R. L. de I. P. Y. C. V., which is an association of manufacturers of twine and other sisal products established to protect the business and financial security of its members.

The constitution and by-laws of the association require registration of both manufacturers and purchasers, and every export permit requires approval by the association.

Prior to January 15, 1960, Midcontinent Twine Company, Inc., a Nebraska corporation, was registered with Cordeleros de Mexico as an authorized importer of twine and was assigned the code number "E.C.".

On January 6, 1960, Midcontinent Twine Company, Inc., by and through its President, Maynard Tritsch, contracted with the bankrupt Donald L. Wilson for the sale by the corporation to Wilson of the registered trade mark "Midcontinent" and "all the rights of the corporation as importer of twine and twine products from Mexico."

By letters dated January 8, 1960, addressed to petitioners on stationery of Midcontinent Twine Company, Inc., petitioners were informed that Midcontinent Twine Company, Inc., had been sold to the bankrupt Wilson, but that Tritsch would continue as Vice-President. One letter was signed by Tritsch as "President" and the other as "Vice-President" of Midcontinent Twine Company, Inc.

On January 15, 1960, on stationery of Midcontinent Twine Company, Inc., signed by both Tritsch and Wilson and filed with Cordeleros de Mexico (January 20, 1960) Cordeleros de Mexico was advised that Wilson had become the new owner of Midcontinent Twine Company, "at its new address in Riverdale, Kansas, where this twine importing company resides now."

Shipments were made by the petitioner Cordeleria Lourdes commencing on February 18, 1960, and ending on March 5, 1960, of some 9,500 bales of twine, marked either "Midstate", "Midcontinent" or "Wheat Belt" baler. The total amount for such twine was $43,700.00.

Drafts were drawn on "Donald L. Wilson—Midcontinent Twine Co., Riverdale Kansas." Drafts for the first invoice and for one-half of the fourth invoice were paid. Drafts covering the unpaid balance of $34,500 were accepted by "Midcontinent Twine Co. by Donald L. Wilson." These drafts are past due and unpaid.

The petitioner Santa Ines sold invoiced shipments to the bankrupt totaling 9,800 bales of twine at a cost in excess of $44,000.00. The bankrupt instructed Santa Ines to draw drafts on Wilson Sugar, Oil & Elevator Company for the stated reason that Midcontinent Twine Company cash payments were handled through that Company. The first shipment was paid for and the last shipment was stopped in transit. Santa Ines now holds a past due draft accepted by "Wilson Sugar, Oil & Elevator Company by Donald L. Wilson" for $20,150.00.

As originally prepared the invoices were addressed to Midcontinent Twine Company. The bank later required the invoices to be rewritten and addressed to Wilson Sugar, Oil & Elevator Company to conform with the drafts. Notice of the shipment was sent to Midcontinent Twine Company, Riverdale, Kansas.

The contracts of sale were all approved by Cordeleros de Mexico, which also issued export permits for shipment to Midcontinent Twine Company, Riverdale, Kansas. On April 25, 1960; Donald L. Wilson and Margie I. Wilson, his wife, and Wilson Sugar & Elevator Company, Inc., a corporation, were adjudged bankrupts.

The trustee took possession of the twine from the bankrupts which had been ordered from the petitioners. This amounted to 12,051 bales of twine of which an unpaid balance remains due and owing to the petitioners in the aggregate amount of $54,650.00.

On May 19, 1960, both petitioners filed reclamation petitions. Both petitioners agreed on May 25, 1960, that the receiver might sell the twine for not less than three-fourths the cost, with liens to follow the proceeds. Answers were filed to the petitions, and the case was heard June 9, 1960. The Referee in Bankruptcy denied the petitioner's reclamation petition and they duly filed their petition for review.

The first knowledge Lourdes had of the relation between Midcontinent Twine Co., Inc., and Wilson came from the letter of January 8, 1960, which stated:

> "I have sold the Trademark 'Midcontinent' to a friend of mine. * * *
>
> "I will remain with the MIDCONTINENT TWINE COMPANY for a period of years as Vice President and in an advisory capacity to the new management, the new Company will purchase only from mills which I approve of in writing to them, which in that manner I will see to it that they do receive quality twines to sell under the MIDCONTINENT LABEL."

The letter was signed "MAYNARD TRITSCH, VICE PRESIDENT MIDCONTINENT TWINE COMPANY, INC."

The petitioners contend that they did not know from the above letter that the enti y changed, but thought that the stock had been sold and Tritsch became the Vice-President. In view of the fact that the petitioners are Mexicans and unfamiliar with American business concepts it would be reasonable to conclude this to be the fact, especially in view of the correspondence which followed. Of the some forty-five documents admitted all of them have in common an indiscriminate use of the following captions:

Midcontinent Twine Co., Inc.

Midcontinent Twine Co., Inc., Maynard J. Tritsch President.

Midcontinent Twine Co., Inc., Maynard J. Tritsch Vice President.

Midcontinent Twine, Inc., Donald L. Wilson.

Midcontinent Twine Co., Maynard J. Tritsch President.

Midcontinent Twine Co., Donald L. Wilson.

Midcontinent Twine Co., Maynard L. Tritsch.

Midcontinent Twine Co.

Donald L. Wilson Midcontinent Twine Co.

Maynard L. Tritsch Midcontinent Twine Co.

Less than a month later on February 2, 1960, Maynard Tritsch, as President of Midcontinent Twine Company, sent an order to petitioner Lourdes. This order indicated that Tritsch was again president of the company he had purported to sell. The testimony of Mr. Casares who is associated with Cordeleria Lourdes is as follows:

Q. Did you have any conversation with either Mr. Wilson or Mr. Tritsch in regard to their business relationship which covers anything more than, or different than was contained in the documents?

A. No, except a letter from Mr. Tritsch that he sold his company. That is all.

Santa Ines received a letter identical in terms as that sent to Lourdes with the exception that it was signed "President" instead of "Vice President".

There was a letter sent to Cordeleros de Mexico dated January 15, a part of which reads as follows:

"Please be advised that the Midcontinent Twine Co., Inc., has been sold to Mr. Donald L. Wilson of Riverdale, Kansas,—Mr. Wilson is now the sole owner of the Midcontinent Twine Co.

"As a result of the above please address all correspondence to the Midcontinent Twine Co. *at its new address* in Riverdale, Kansas, where *this* Twine Importing Co. resides now."

The letter was signed by Maynard Tritsch and by Donald L. Wilson.

Santa Ines knew of this letter sent to Cordeleros de Mexico whereas Lourdes did not have such knowledge. However, only five days later on January 20, 1960, Santa Ines addressed a letter to "Midcontinent Twine Company, Inc., Riverdale, Kansas." And as late as March 19, 1960, Santa Ines received an order signed "Midcontinent Twine, Inc., Donald L. Wilson."

The testimony of Mr. Martin, who is a partner in the corporation of Cordeleria Santa Ines, indicates that he was not aware of the relationship between Messrs. Tritsch and Wilson.

Q. Now was there anything additional said to you by either Mr. Wilson or Mr. Tritsch in regard to the nature of the transaction between Mr. Wilson and Mr. Tritsch, other than what we already have obtained from these documents?

A. Mr. Tritsch said he sold his company to Mr. Wilson, and Mr. Wilson said he bought it.

As to the reason for Santa Ines' drawing a draft on Wilson Sugar, Oil & Elevator Company, Mr. Martin gave the following reason:

Q. Now how did it occur that your draft was drawn on Wilson Sugar, Oil and Elevator Company?

A. I was told to do so.

Q. By whom?

A. By Mr. Wilson, who gave me a paper with the name of the Wilson Sugar, Oil and Elevator Company and the name of the bank in Wellington, Kan-

sas, and told me to draw the draft that way on that bank.

Q. And did he explain to you why he was directing you to draw your draft on Wilson Sugar, Oil and Elevator Company?

A. He just said he had not handled accounts from Midcontinent; he wanted it that way.

There is some dispute as to the last answer, however the Referee's understanding accorded with the petitioner's. The findings read, "The bankrupt, Donald L. Wilson, instructed Santa Ines to draw drafts on Wilson Sugar, Oil & Elevator Company for the stated reason that Midcontinent Twine Company cash payments were handled through that company."

Q. Mr. Martin, didn't you know from the correspondence, the telegrams and the drafts that Wilson Sugar, Oil and Elevator Company must have some interest in this twine you were shipping?

A. No, sir.

Q. You knew that you drew the drafts for your payment on them, on that corporation?

A. On the request of the man who told me he was the owner of the Midcontinent Twine Company.

Q. You did draw the drafts on the Wilson Sugar, Oil and Elevator Company?

A. Yes, sir.

During the examination of this witness, both Tritsch and Wilson were present in the court room, with Wilson at the counsel table. In view of *Nicholas* v. *Davis*, 10th Cir., 204 F.2d 200, Syl. ¶2.

> "When controlling positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstance reflected in the record casts doubts on its verity, then it may not be disre-

garded even though adduced from interested witnesses."

However, the Referee stated in his opinion:

> "It is clear to the Court that the petitioners and Cordeleria de Mexico knew and should have known that they were dealing with Donald L. Wilson, a new company, and not with Tritsch or Mid-Continent Twine Company, Inc. They sold and shipped material to his address in Riverdale, Kansas, and received partial payment from Wilson or his corporation on the materials shipped. The materials were received by Wilson and his corporation at Riverdale, Kansas."

The Referee should have regarded the testimony of the two witnesses, Martin and Casares. From their testimony it is evident that the petitioners did not understand the nature and effect of the agreement between Tritsch and Wilson. They dealt with Wilson as though he were the Midcontinent Twine Company, Inc., when in fact he was not. The correspondence between Wilson and the petitioners on one hand and Tritsch and the petitioners on the other would lead the petitioners to believe that they were still dealing with the Midcontinent Twine Company, Inc.

More persuasive yet, is the fact that Cordeleros de Mexico, S. de R. L. de P. I. Y. C. V. authorized and permitted the exportation of twine to the United States under the address of Midcontinent Twine Company, Riverdale, Kansas. Manifestly the association must have thought that the purchaser was the same as when Tritsch purchased in spite of the fact that they received correspondence advising them of the sale of the tradename "Midcontinent". Of all, they would have been the most observing and critical of the import-purchasers.

Counsel for the trustee argued that the petitioner Santa Ines should have known that it was contracting with

Wilson Sugar, Oil & Elevator Company when it was instructed by Wilson to draw drafts on that company. It should be noted, however, that the contracts were with Midcontinent Twine Company, and not the Wilson Company. Other than the invoices explained by Martin's testimony, the only communication Santa Ines ever addressed to Wilson Sugar, Oil & Elevator Company related to the drafts.

The issue to be determined herein is whether the trustee has title to the materials shipped by petitioners to the bankrupts. In order for the petitioners to successfully maintain their petition for reclamation of the goods from the bankrupt, they should have the burden of adducing facts sufficient to establish that their claim to possession is superior to the prima facie right of the trustee. *National Silver Co.* v. *Nicholas*, 5th Cir., 205 F.2d 52.

In support of the contention that the trustee does not have title petitioners call the court's attention to the legal consequences of the undisputed testimony they gave in the hearing as to the lack of knowledge that they were dealing with Wilson or his company. Petitioners further content in view of the rule above announced, that the contract could not have been a contract for the sale of twine to be exported because Wilson was not authorized to enter into such a contract.

Petitioners cite *Arkansas Valley Smelting Company* v. *Belden Mining Co.*, 127 U.S. 379, 387, as supporting the rule that everyone has a right to select and determine with whom he will contract, and he cannot have another person thrust upon him without his consent. This, of course. is the rule.

The petitioners cite Williston on Sales, Revised Edition §635, page 444:

"A method of fraud in obtaining goods not infrequently used by a fraudulent buyer is to induce the seller to believe that the fraudulent buyer is another person having good credit. If the buyer induces the seller to assent to the transfer of title in the goods to him under such a mistaken belief, title will pass although it will be voidable for fraud. Thus where the buyer presenting himself in person obtains the assent of the seller to a sale of the goods to him by pretending to be someone else, title passes, although as between the parties the transaction is voidable. * * *"

§656, page 514:

"If parties enter into a bargain on the assumption that certain things are true, it is inequitable to enforce the bargain or to allow it to stand if the mistake relates to a matter so fundamental that it must be assumed that the parties would not have entered into the transaction had they known the truth; or it may be more clearly put: If the mistake vitally affects a fact or facts on the basis of which the parties contracted the contract should be voidable by an injured party; and the materiality of a fact as to which the parties were mistaken is strong evidence that it was assumed as a basis for the bargain. Here the consequences of the mistake is not the failure to express an intended agreement (in which case the failure might be rectified), but the entering into any bargain at all, in view of the circumstances. To rescind the transaction is, therefore, the only available remedy. * * *"

The situation of Lourdes and Santa Ines is identical with the exception that the Santa Ines drafts were drawn on and accepted by Wilson Sugar & Elevator Company. The sales were clearly made to Midcontinent Twine Company. There can be little doubt about that fact as an examination of the documents admitted into evidence will bear this out.

It is certainly apparent that the mistake involved herein is a vital one since only approved purchasers were permitted to purchase twine and other sisal products.

The trustee on the other hand presents the argument that in spite of any mistake, the parties continued in their dealings and the petitioners are now, therefore, estopped to claim the contracts void. The trustee has cited many cases and text treatments of the rules involved in estoppel. These rules do not apply in the instant case, however, for the reason that the petitioners could not have known that they were no longer dealing with Midcontinent Twine Company, Inc., since all of the correspondence from Wilson indicated that he, Wilson, was associated with Midcontinent Twine Company. Therefore, the petitioners did not know that Wilson was independent of Midcontinent Twine Company.

The trustee cites *National Silver Co.* v. *Nicholas*, 5 Cir., 205 F.2d 52, 55, in support of his contention that the Referee could disregard the uncontradicted statements of Martin and Casares. All that need be said is that such a construction cannot be found in the case.

The next line of cases cited by the trustee involve the equitable maxim of the unclean hand doctrine. Again this doctrine is not determinative of the issue in this case for the same reason as was advanced under the estoppel theory.

Considering the uncontradicted and unimpeached testimony on behalf of petitioners, the correspondence between the parties, the prohibition against the sale of products to non-authorized purchasers and the petitioners unfamiliarity with the English language and American business terminology, only one conclusion can be reached. Petitioners did not know that they were actually doing business with Wilson and not with Midcontinent.

It is concluded that the finding of the Referee is clearly erroneous and the reclamation petitions should be granted and the contracts rescinded.

Counsel for petitioners will prepare an appropriate order.

/s/ Delmas C. Hill
Judge, Assigned.

APPENDIX C.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6959—SEPTEMBER TERM, 1962

JOHN A. POTUCEK, Trustee of WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt,
Appellant,
vs.
CORDELERIA LOURDES and CORDELERIA SANTA INES,
Appellees.

In the Matter of DONALD L. WILSON and MARGIE I. WILSON and WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt.

Appeal from the United States District Court for the District of Kansas.

Malcolm Miller for Appellant.

Wayne Coulson (Paul R. Kitch, Dale M. Stucky, Donald R. Newkirk, Robert J. Hill, and Gerrit H. Wormhoudt, and Hugo T. Wedell and Homer V. Gooing, Of Counsel, were with him on the brief) for Appellees.

Before Lewis, Breitenstein and Seth, Circuit Judges.

Breitenstein, Circuit Judge.

The question is whether, in voluntary bankruptcy proceedings, petitions in reclamation should be allowed on the ground that a mistake in the identity of the purchaser gave petitioners the right to rescind the transactions through which the Bankrupt gained possession of goods sought to be reclaimed. The Referee denied the petitions and the district court reversed.

Appellant is the Trustee of the bankrupt estates of Donald L. Wilson, Margie I. Wilson, and Wilson Sugar and Elevator Company, Inc., which, without objection, were consolidated and treated as one entity, herein referred to as Bankrupt. The appellees, Cordelería Lourdes, S. A., (Lourdes) and Cordelería Santa Ines, S. A., (Santa Ines) are corporations organized under the laws of Mexico, have offices at Yucatan, Mexico, and fabricate sisal products including baling and binding twine. The law of Mexico vests control over twine exportation in the Secretary of Industry and Commerce (Secretary). An order of the Secretary requires permits for twine exportation and the approval of such permits by him and by Cordeleros de Mexico, S. de R. L. de I. P. Y. C. V.[1] (Association), which is an association of manufacturers of sisal products formed to protect the business and financial security of its members. The constitution and by-laws of the Association compel the registration of both manufacturers and purchasers of twine.

Midcontinent Twine Company, Inc. (Midcontinent), a Nebraska corporation, was registered with the Association

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1. The English translation of the words indicated by the initials is "Association of Limited Responsibility of Public Interest and Variable Capital."

as an authorized purchaser of twine. In January, 1960, Midcontinent, acting by its president, Tritsch, contracted with Bankrupt for the sale by Midcontinent to Bankrupt of the registered trade-mark "Midcontinent" and of "all the rights of the corporation as importer of twine and twine products from Mexico." During February and March, 1960, Lourdes and Santa Ines shipped to Bankrupt 19,300 bales of twine on which the unpaid balances are $34,500 and $20,150, respectively. The Wilsons and their company were adjudicated bankrupt on April 25, 1960. The Trustee took possession of 12,051 bales of twine. Lourdes and Santa Ines each filed a reclamation petition asserting that they believed that they were doing business with Midcontinent, that Bankrupt was not an authorized purchaser, and that Bankrupt's possession of the twine was without title or right. By agreement the twine was sold with the liens, if established, to follow the proceeds.

The Trustee contends that the district court had no jurisdiction to review the Referee's order denying the reclamation petitions because the petitions for review were filed out of time. The applicable statute is §39(c) of the Bankruptcy Act which, as amended in 1960,[2] provides in its

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2. 11 U.S.C. §67(c), Section 39(c) of the Bankruptcy Act, as amended in 1960, reads thus: "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

first sentence that a person aggrieved by an order of a referee may file a petition for review within 10 days after the entry of the order complained of "or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow." The third sentence provides that the referee's order shall become final unless the aggrieved person shall petition for review "within such ten-day period, or any extension thereof."

The Referee's order denying the petitions in reclamation was filed on September 12, 1960. On September 22 the court extended the time to October 12, and on October 12 the time was further extended to December 12. The reason assigned for the second request was the inability of the reporter to furnish a transcript of the hearing. The petitions for review were filed October 26, 1960. The timeliness of the review petitions depends on the validity of the second extension.

Section 2(a)(10) of the Bankruptcy Act[3] invests the courts of the United States with jurisdiction to:

> "Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings."

Section 39(c) prior to the 1960 amendment provided that persons aggrieved by referees' orders might file a petition for review within 10 days after the entry of the order "or within such extended time as the court may for cause shown allow."

In *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 151-153, the Supreme Court considered whether §39 (c) as it read before the 1960 amendment was "a limitation on the power of the District Court to act or on the

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3. 11 U.S.C. §11(a)(10).

right of a party to seek review." In that case the district court held that it was without jurisdiction because the petition for review was not filed in time. The Supreme Court reversed, saying:

> "The power in the bankruptcy court to review orders of the referee is unqualifiedly given in §2(10). The language quoted from §39(c) is rather a limitation on the 'person aggrieved' to file such a petition as a matter of right."

The 1960 amendment was intended to eliminate confusion as to the finality of referees' orders and was recommended to Congress by the Judicial Conference of the United States.[4] That amendment did not affect the jurisdiction given to the district courts by §2(a)(10) but did affect the exercise of such jurisdiction. While the amendment limits the absolute right of a party to file a petition to review unless the petition is filed within the 10-day period or an extension granted within that period, it does not limit the discretionary power of a district court to receive and grant such petition when the petition is filed within the 10-day period or any extension thereof.

We must construe the 1960 amendment so that it is consistent within itself and with the other provisions of the bankruptcy laws. The cases which have been decided since 1960 and which have been called to our attention are not helpful as all concern situations in which no petition for review was filed, and no extension obtained, within the 10-day period.[5]

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4. 2 U. S. Cong. & Adm. News '60, pp. 3194-3197.

5. See *In the Matter of Acme Furnace Fitting Company*, 7 Cir., 302 F.2d 318; *In re A. Edward Harnik*, D.C.W.D. Ark., 207 F. Supp. 325; *In the Matter of Raymond Earl Lawson*, D.C.W.D. Va., 20. F. Supp. 710; *In the Matter of Victor P. Danenza*, D.C. E.D. N.Y., 200 F. Supp. 694; *In the Matter of Sol Silver*, D.C.

General Order 37[6] makes the Federal Rules of Civil Procedure applicable to proceedings under the Bankruptcy Act "in so far as they are not inconsistent with the Act." Rule 6(b), F.R.Civ.P., permits the enlargement of time "if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order." The third sentence of the amendment refers to "any" extension and not to an extension obtained within the period limited by the first sentence. Nothing in the third sentence is inconsistent with Rule 6(b).

As we read the amendment it limits the absolute right of an aggrieved person to file a petition for review but does not deny the discretionary power of the district court to receive and determine such petitions when they are presented in compliance with Rule 6(b). So construed §39(c) is consistent within itself, consistent with 2(a)(10), and consistent with Rule 6(b). In the case at bar the second extension was obtained within the time granted by the first extension and that extension was granted within the 10-day period. The requirements of Rule 6(b) were met and the petitions were timely.

The Referee found as a fact that Lourdes and Santa Ines knew or should have known that they were dealing with Bankrupt rather than Midcontinent and on the basis of that finding concluded that title to the twine had passed to Bankrupt. The district court rejected this finding.

S.D. N.Y., 199 F. Supp. 836; *In the Matter of Middletown Packing Company*, D.C. Conn., 199 F. Supp. 657; and *In the Matter of George Lewis Watkins*, D.C. W.D. Va., 197 F. Supp. 500.

6. General Orders in Bankruptcy, following 11 U.S.C.A. §53.

The district court must accept the fact findings of the referee unless they are clearly erroneous.[7] On this appeal we are in the same position as is the Supreme Court when it considers a case wherein the court of appeals has set aside a fact finding of the district court. In such a situation the Supreme Court has said that the question is whether the findings of the district court, not of the court of appeals are clearly erroneous.[8] A majority of the courts of appeals have held that where the district court rejects a referee's findings as clearly erroneous, the court of appeals applies the clearly erroneous test to the decision of the referee.[9] Accordingly, our problem is whether the crucial fact finding of the Referee is clearly erroneous.

The evidence consists of the order of the Secretary relating to the exportation of twine, the regulations of the Association, letters and telegrams passing between

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7. General Order 47, General Orders in Bankruptcy, following 11 U.S.C.A. §53, provides that the judge shall accept the referee's findings of fact unless clearly erroneous. Nothing is gained by inquiry into the question of whether General Order 47 applies to general references or only to special references. Compare *Mazer* v. *United States*, 7 Cir., 298 F.2d 579, 581-582, and *Simon* v. *Agar*, 2 Cir., 299 F.2d 853, with *Gross* v. *Fidelity & Deposit Company of Maryland*, 8 Cir., 302 F.2d 338, 339, because by the operation of General Order 37, Rules 52(a) and 53(e)(II), F.R.Civ.P., apply. See *Engelbrecht* v. *Bowen*, 9 Cir., 300 F.2d 891, 895.

8. *McAllister* v. *United States*, 348 U.S. 19, 20-21.

9. *In the Matter of Herman Tabibian*, 2 Cir., 289 F.2d 793, 795; *Phillips* v. *Baker*, 5 Cir., 165 F.2d 578, 582; *In re Newman*, 6 Cir., 126 F.2d 336, 337; *In re Skrentny*, 7 Cir., 199 F.2d 488, 492; *Gross* v. *Fidelity & Deposit Company of Maryland*, 8 Cir., 302 F.2d 338, 339-340; *Lines* v. *Falstaff Brewing Co.*, 9 Cir., 233 F.2d 927, 930, certiorari denied 352 U.S. 893; cf. *Forbush Co.* v. *Bartley*, 10 Cir., 78 F.2d 805, 806. But see *In the Matter of the Arbycraft Co.*, 3 Cir., 288 F.2d 553, 556; *Mountain Trust Bank* v. *Shifflett*, 4 Cir., 255 F.2d 718, 720; *Stewart* v. *Ganey*, 5 Cir., 116 F.2d 1010, 1012-1013; and *Carr* v. *Southern Pac. Co.*, 9 Cir., 128 F.2d 764, 768.

Lourdes and Santa Ines, on the one hand, and either Bankrupt or Tritsch, president of Midcontinent, on the other, and various bills of lading, invoices, and drafts plus the testimony of an officer of Lourdes and an officer of Santa Ines. An exposition of the evidence in detail will add nothing to this opinion. Considering the exhibits in the manner most favorable to the Trustee they show confusion as to whether the transactions in question were with Midcontinent, an authorized purchaser, or with Bankrupt which was not so authorized. This confusion was created by Bankrupt and Tritsch and could have been clarified by them. The positive testimony of the representatives of the Mexican companies was that they believed that they were dealing with Midcontinent and that they would not and could not have dealt with Bankrupt because of lack of authorization. This testimony was not weakened by cross-examination and is not inconsistent with the exhibits. It is inherently probable because the conduct described complies with Mexican law.

If, as the Trustee contends, Lourdes and Santa Ines knew that the transactions were with another entity than Midcontinent, Bankrupt and Tritsch could have come forward with contradicting testimony. The fact that Tritsch and Bankrupt were each present at the trial before the Referee is not denied. Neither of them testified.

In *Nicholas* v. *Davis*, 10 Cir., 204 F.2d 200, 202, the Tenth Circuit held that:

> "When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstance reflected on the record casts doubt on its verity, then * * * it may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination by the jury."

The rule so stated applies here. The confusion in the exhibits arising from variations in the corporate name of Midcontinent and from the different capacities in which Tritsch signed communications from Midcontinent does not cast doubt on the positive testimony of the representatives of Lourdes and Santa Ines. The methods in which the orders were placed, the shipments billed, and the sight drafts presented do not, in and of themselves, impeach or contradict the testimony. Further, all buyers had to be registered with the Association. Midcontinent was so registered but Bankrupt was not. The purchase orders had to be approved by the Association and an order to an unregistered buyer would not be approved. The transactions in question were approved by the Association. Such approval would not have been secured if it had been known that the shipments were to an unregistered buyer. Viewing all the evidence we are left with the definite and firm conviction that the Referee was mistaken in finding that Lourdes and Santa Ines knew or should have known that they were doing business with Bankrupt rather than Midcontinent. Accordingly, the finding is clearly erroneous[10] and its rejection by the district court was proper.

The Trustee took the twine possessed by Bankrupt on the date of bankruptcy "with all the rights, remedies, and powers of a creditor than holding a lien thereon."[11] Absent any controlling provision of the Bankruptcy Act the validity, nature and effect of a lien on the property of a bankrupt are governed by the law of the state where the property is situated.[12] We are concerned here with no questions as to the rights of intervening creditors or of bona

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10. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395.

11. 11 U.S.C. §110(c).

12. *Porter* v. *Searle*, 10 Cir., 228 F.2d 748, 750.

fide purchasers. The issue is not whether the contract of sale was valid in Mexico but whether the mistake made by Lourdes and Santa Ines in the identity of the purchaser of the twine entitles them to the rescission of the contract and the restitution of the twine taken over by the Trustee. The laws of Mexico are relevant only to the extent that they bear on the conduct of Lourdes and Santa Ines.

Lourdes and Santa Ines sold twine to Bankrupt when they believed they were selling to Midcontinent. A person has the right to contract with whom he will[13] and cannot be held to have contracted with a person other than the one he contemplated.[14] The Trustee urges that there may be no rescission because the mistake was unilateral and the goods were delivered and paid for in part.

A mistake justifying rescission need not be mutual.[15] The mistake of one party justifies affirmative relief when the fact as to which the mistake is made goes to the basis of the transaction,[16] and was known to the other party to the transaction.[17] The mistake of Lourdes and Santa Ines was material and went to the heart of the transaction because it directly affected their right and power to sell. Bankrupt knew that the transaction required approval by the Secretary and the Association, that a transaction with an unregistered purchaser would not be approved, and that it was not a registered purchaser. The mistake in

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13. *Arkansas Valley Smelting Company* v. *Belden Mining Company*, 127 U.S. 379, 387.

14. *School Sisters of Notre Dame* v. *Kusnitt*, 125 Md. 323, 93 Atl. 928, 934; *Jones* v. *Chicago, B. & Q. R. Co.*, 102 Neb. 853, 170 N.W. 170.

15. Corbin on Contracts, Vol. 3, §608, p. 669.

16. Restatement, Restitution, §12, comment c, p. 51.

17. Williston on Contracts, Rev. Ed., Vol. 5, §1573, p. 4399.

identity was known to Bankrupt because it knew its own identity and its conduct was such that it either knew or should have known that Lourdes and Santa Ines thought they were dealing with Midcontinent.[18] A review of the authorities convinces us that in such circumstances a unilateral mistake is ground for rescission.[19] The record discloses no negligence, laches, or estoppel which would militate against the right of Lourdes and Santa Ines to rescind.

Partial payment by Bankrupt does not defeat rescission. The return or offer to return of that which was received in the transaction is not necessary when the thing received is money which can be credited if restitution is granted.[20]

Affirmed.

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18. See Corbin, *supra*, §601, p. 611.

19. *C. N. Monroe Manufacturing Company* v. *United States*, D.C.E.D. Mich., 143 F. Supp. 449, 451, and cases there cited. See also *United States* v. *Jones*, 9 Cir., 176 F.2d 278. Cf. *Grymes* v. *Sanders*, 93 U.S. 55, 60.

20. Restatement, Restitution, §65(f), p. 255, and illustrations to clause (f), pp. 263-264. Cf. *Shields* v. *Meyer*, 183 Kan. 111, 325 P.2d 29, 34.

APPENDIX D.

Legislative History

BANKRUPTCY—REVIEW OF ORDERS OF REFEREES

For text of Act see p. 602

Senate Report No. 1689, June 24, 1960
[To accompany H.R. 6556]
House Report No. 585, June 26, 1959
[To accompany H.R. 6556]
The Senate Report is set out.

Senate Report No. 1689

The Committee on the judiciary, to which was referred the bill (H.R. 6556) to amend subdivision c of section 39 of the Bankruptcy Act (11 U.S.C. 67c) so as to clarify time for review of orders of referees, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE

The purpose of the bill, as amended, is to clarify the filing time for review of orders of referees in bankruptcy.

STATEMENT

The bill is recommended by the Judicial Conference of the United States.

Section 39c of the Bankruptcy Act (11 U.S.C. 67c) now provides:

> c. A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of

such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

A failure to file a petition for review of a referee's order within the prescribed 10 days after the entry of the order has generally been held, unless an extension is granted, to be fatal to the petition for review.

The Supreme Court, however, has held that a bankruptcy court may, in its discretion, grant an extension even after the expiration of the 10-day period. The Court held (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 153 (1942)) that although 39c limits an aggrieved party in seeking review as a matter of right after the 10-day period, it places no limitation upon the discretion of the bankruptcy court to entertain a petition for review after the expiration of that period.

There is now uncertainty as to the finality of a referee's order under this doctrine that a bankruptcy court may entertain an untimely petition for review even in the absence of an extension of time. The purpose of the bill is to fix a definite period of time within which an application for review must be filed.

The bill amends section 39c so as to make it clear that a petition for review must be filed within the prescribed 10-day period or within such extended time as the court may allow upon petition for extension itself filed within such 10-day period.

The amendment recommended by the Administrative Office of the U. S. Courts to the bill as passed by the

House of Representatives provides further, for the purposes of clarification, that unless the person aggrieved shall petition for review of such order within such 10-day period, or an extension thereof, the order of the referee shall become final.

The committee believes that the bill as passed by the House of Representatives and as amended for purposes of clarification, as recommended by the Administrative Office of the U. S. Courts, is meritorious and recommends it favorably.

Attached and made a part of this report are (1) a letter, dated April 16, 1959, from the Administrative Office of the U. S. Courts and (2) a letter, dated June 16, 1960, from the Administrative Office of the U. S. Courts.

Administrative Office of the U. S. Courts,
Washington, D. C., April 16, 1959.

Hon. Sam Rayburn
Speaker, House of Representatives,
Washington, D. C.

Dear Mr. Speaker: There is transmitted herewith, on behalf of the Judicial Conference of the United States, a bill to amend subdivision c of section 39 of the Bankruptcy Act (11 U.S.C. 67c) so as to clarify the time for review of orders of referees.

An explanation of the proposed bill is attached. Representatives of this office will be glad to appear before the committee and to provide any further information which may be desired concerning the bill.

Respectfully,

Warren Olney III,
Director.

EXPLANATION OF PROPOSED BILL TO AMEND SUBDIVISION C OF SECTION 39 OF THE BANKRUPTCY ACT (11 U.S.C. 67) SO AS TO MAKE IT CLEAR THAT A PETITION FOR REVIEW BY ORDER OF REFEREE MUST BE FILED WITHIN THE PRESCRIBED 10-DAY PERIOD UNLESS TIME IS EXTENDED BY THE COURT

Subdivision c of section 39 now reads:

> "c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

Subdivision c was added to section 39 by the Chandler Act of 1938 for the purpose of clearly outlining the procedure to be followed in obtaining a review of a referee's order, and in the interest of certainty and uniformity. Prior to the Chandler Act, the right to have orders of the referee reviewed by the judge was governed by General Order 27. Subdivision c incorporated into the act the essence of former General Order 27, which has been abrogated. It also was intended to remedy a previous deficiency in both the Bankruptcy Act and the general orders in that a definite period of 10 days has been provided as the time in which to file a petition for review. General Order 27 contained no time limitation, though local rules in various districts prescribed a time within which the application must be filed. (See "Collier on Bankruptcy," 14th

ed. vol. 2, sec. 39.16. See also "Remington on Bankruptcy," vol. 8, sec. 3406.)

Section 39c stipulates "ten days after the entry thereof" as the period within which a petition for review of a referee's order must be filed. Generally the failure to file within this time, unless an extension is granted, is fatal to the petition for review. However, in In re Steinberg ((S.D. Calif. 1956) 138 F. Supp. 462), the court held that the expiration of the 10-day period does not preclude the court from entertaining a petition for review, having power to exercise its own discretion in the matter. The effect of the expiration of the 10-day period is only that a petitioner cannot have a review as a matter of right. (See "Collier on Bankruptcy," 14th ed. vol. 2, sec. 39.20, and the other cases cited under note 8.)

Uncertainty as to the finality of a referee's order now exists because of the holdings of some courts that a bankruptcy court may entertain an untimely petition for review, even in the absence of an extension of time. In view of this an amendment to section 39c is needed that will fix a definite period of time within which an application for review must be filed. The bill would amend section 39c so as to make it clear that the petition for review must be filed within the prescribed 10-day period or within such extended time as the court may allow upon petition for extension filed within such 10-day period.

The Judicial Conference of the United States, at its meeting in March 1959, upon the recommendation of its Committee on Bankruptcy Administration, approved the proposed measure.

Administrative Office of the U. S. Courts,
Washington, D. C., June 16, 1960.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

Dear Senator Eastland: At the direction of the Judicial Conference of the United States an amendment is recommended to H.R. 6556, to amend subdivision c of section 39 of the Bankruptcy Act to clarify the time for review of orders of referees. This bill passed the House on July 6, 1959, and is now pending before the Senate Judiciary Committee.

The Judicial Conference, at its September 1959, meeting, approved a recommendation of its Committee on Bankruptcy Administration that the bill as passed by the House be amended by inserting after the second sentence the following:

> "Unless the person aggrieved shall petition for review of such order within such 10-day period, or any extension thereof, the order of the referee shall become final."

The Judicial Conference also authorized the Administrative Office to present the amendment to the Senate Judiciary Committee. The Conference at its March, 1960, meeting reaffirmed its approval of the bill with the amendment. Therefore, it is asked that the bill be so amended and enacted into law.

Sincerely yours,

Edwin L. Covey,
Chief of Bankruptcy.

Office Supreme Court, U.S.
FILED
FEB 13 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 778.

JOHN A. POTUCEK, Trustee of WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt,
Petitioner,

vs.

CORDELERIA LOURDES and CORDELERIA SANTA INES,
Respondents.

In the Matter of DONALD L. WILSON and MARGIE I. WILSON and WILSON SUGAR AND ELEVATOR COMPANY, INC., Bankrupt.

ON PETITION FOR CERTIORARI

BRIEF OF RESPONDENTS.

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OPINION BELOW.

The opinion of the Court of Appeals is reported in 310 F.2d 527.

References are to the record printed for the court below.

STATEMENT OF THE CASE.

The order of the referee was entered September 12, 1960. (R. 52) Counsel for respondents first learned of the entry of the order on September 22, 1960. (R. 52-53) On the same day, upon application of counsel for respondents, the court entered an order extending the time for filing petition for review to October 12, 1960. (R. 53-54) On October 12, 1960, upon application of counsel for respondents, the court further extended the time for filing petition for review to December 12, 1960. (R. 53-54)

The verified application for the further extension stated as ground therefor that the court reporter had been unable to complete the transcript of the proceedings and testimony before the referee. (R. 53) The second extension was granted by the referee, who had personal knowledge of the facts stated in the application. (R. 54)

Petitions for review were filed October 26, 1960, long prior to expiration of the second extension. (R. 54-60)

A local rule required that a petition for review contain appropriate references to the transcript. (Appendix A)

ARGUMENT.

I.

Construction of 11 U.S.C., Section 67(c), Is Not Doubtful.

11 U.S.C. 67(c) provides:

"(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof or with-

> in such extended time as the court *upon petition filed within such ten-day period* may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. *Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final.*"

The italicized portions of the statute were added by amendment effective July 14, 1960. 74 Stat. 528.

The purpose of the statute was to change the rule of *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, under which discretionary review was permitted even though nothing whatsoever had been filed within ten days after entry of the referee's order.

As passed by the House only the first sentence was amended in the italicized particulars. At the request of the Judicial Conference of the United States, the bill was amended in the Senate by adding the third sentence. U. S. Code, Congressional and Administrative News, 86th Congress, Second Session, Vol. 2, p. 3197.

The amendment to the second sentence had no effect whatsoever upon the doctrine of the *Pfister* case. Only the third sentence effectuated the purpose. Nothing in that sentence would prevent review in the case at bar. The petition was clearly filed "within such ten-day period or *any* extension thereof."

Petitioner's contention is founded upon the first sentence alone. The Court of Appeals followed the *Pfister* case in holding that nothing in that sentence forbade discretionary review.

The purpose of the rule was to prevent discretionary review where neither a petition for review nor an application for an extension had been filed within the ten day period.[1] This purpose is served equally well by one or multiple extensions provided application for extension is made within ten days, and provided application for a second extension is made prior to expiration of a prior extension. It is not even necessary that the application for an extension be acted upon within the ten day period.[2]

General Order 37 makes the Rules of Civil Procedure applicable "in so far as they are not inconsistent with the Act or with these general orders * * *."

Rule 6(b) authorizes the court with or without notice to enlarge time "if request therefor is made before the expiration of the period originally prescribed *or as extended by a previous order* * * *." (Emphasis supplied)

Unless inconsistent with the statute this rule governs and under it the petitions for review were clearly timely. Is it inconsistent with the statute?

The only cases we have found hold that the statute means the same thing as the rule.

In *MacFarland* v. *Byrnes*, 19 App. D.C. 531, 535, the court said:

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1. "There is now uncertainty as to the finality of a referee's order under this doctrine that a bankruptcy court may entertain an untimely petition for review even in the absence of an extension of time. The purpose of the bill is to fix a definite period of time within which an application for review must be filed." Report of Senate Judiciary Committee, U. S. Code, Congressional and Administrative News, 86th Congress, Second Session, Vol. 2, p. 3197.

2. Cf. *Candal De Lopez* v. *Sociedad Espanola De Auxilio, etc.*, 1 Cir., 45 F.2d 331.

"With reference to the motion to dismiss the appeal in this case on the ground that the transcript of record was not filed here in time, we find no merit in the proposition that the jurisdiction of the court below to grant an extension of time was exhausted by the first extension granted. We have decided that, after the lapse of the time prescribed by our rules for filing the transcript of record here, or after the lapse of any extension of such time granted during the first period, the court below is without authority to grant any further extension. *District of Columbia* v. *Roth*, 18 App. D.C. 547. *But we find no good reason for refusing that authority to the court, as long as the cause remains within its jurisdiction; and the cause remains within its jurisdiction for this purpose during the whole period of the extension.* Rule 15 of the rules of this court, which confers the authority under which the court below has assumed to act, provides that 'it shall be the duty of the appellant, within forty days from the time of the appeal entered and perfected in the court below, unless such time for special and sufficient cause be extended by the court below, or the judge thereof by whom the judgment, decree or order may have been rendered, such time to be definite and fixed, to produce and file with the clerk of this court a transcript of the record of such cause.' It is argued that this means only one extension, because otherwise the court below might grant extensions from time to time indefinitely, and the time of extension would therefore not be 'definite and fixed.' *But that this is not the meaning of the rule seems to us to be very plain, when it is remembered that under the authority to grant one extension, if only one is granted, the court could allow as long delay as by many extensions. The rule is intended for the purpose of justice. It confers a discretionary power to grant an extension for good and sufficient cause; and it is not to be presumed that the discretion will be abused. The 'good and sufficient cause' may well continue beyond the first period of extension.* We may assume that there was no reason

> for urgency in this case, and that there may have been a tacit understanding between the parties not to push it until a decision should be had from the Supreme Court in the case of *Davidson* v. *Wight*. But whatever the good and sufficient cause may have been we are of opinion that it was not the purpose of the rule, and that it is not its requirement, to limit the court below to one extension of time; provided of course, that any second extension is made, as in this case, within the lifetime of the first extension; and provided, also, that the length of the extension and the number of extensions are not unreasonable." (Emphasis supplied) (pp. 535-537)

Tallmadge v. *Hooper*, 37 Or. 503, 61 Pac. 349, a statute required the filing of the record on appeal within thirty days after perfection of the appeal, but authorized the court or judge to enlarge the time but "such order shall be *made* within the time allowed to file the transcript." The appeal was perfected on January 22. On February 15 the court extended the time for filing the transcript to April 1. On March 31 the court further extended the time to April 15 and the transcript was filed prior to that date. In denying appellee's motion to dismiss the court said:

> "In support of the second contention, it is argued that while the trial court or judge thereof, or the supreme court or a justice thereof, is authorized to enlarge the time for filing a transcript on appeal, such order can be made only within the 30 days allowed to file the transcript. But this does not impress us as the better view. * * * The 'time allowed to file the transcript,' within the meaning of the law, is the 30 days provided by the statute, or such an extension thereof as may have been granted." (p. 351)

Title 11, section 67 (c) in the second sentence requires that the petition for review "set forth the order complained of and the alleged errors in respect thereto." This require-

ment is made more specific by local rule VII, of which this court takes judicial notice.[3] The local rule requires that the petition for review make "appropriate references to the transcript." (Appendix) Subsection (a)(8) of the same section 67 of Title 11 requires the referee to transmit "a transcript of the evidence or a summary thereof" to the judge upon the filing of a petition for review.

The second extension was granted prior to expiration of the first because the reporter had not completed the transcript of the evidence. (R. 53, 54) In most instances it would be impossible to prepare a petition complying with the requirement that the petition set forth the alleged errors without the transcript. In all instances it would be impossible to prepare a petition complying with the local rule without the transcript. In all instances it would be impossible for the referee to certify the record in compliance with section 67 (a)(8) without the transcript.

To construe the statute in such a way as to preclude review if the petitioner or the court granting the extension should underestimate the time required for preparation of a transcript would be at odds with the purpose of the statute and unreasonable.

"All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and the legislative purpose." *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394.

"Every statute must be interpreted in the light of reason and common understanding to reach the results

3. *Johnson* v. *2500 Wisconsin Avenue*, D.C. Cir., 231 F.2d 761.

intended by the legislature." *Rathbun* v. *United States*, 355 U.S. 107, 109.

Giving the statute a reasonable interpretation, the jurisdictional requirement for review is the filing of the petition for review or a petition for extension within the ten day period. Within the meaning of the statute, if a petition for an extension be filed and an order entered thereon within the ten day period a second extension entered prior to expiration of the first is an extension upon petition filed within the ten day period.

The use of the words "any extension" in the third sentence of section 67(c) is itself a recognition that multiple extensions may be required. "Any" ordinarily is a comprehensive word meaning each and every.[4]

The case at bar is the first case interpreting the amended statute in regard to multiple extensions upon application filed within the ten day period. We think it highly improbable that the Court of Appeals for any other circuit will arrive at a different conclusion. If that should occur, it will be time enough then for review by this court.

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4. *United States* v. *Rosenwasser*, 323 U.S. 360, 362-363; *Kuhlman* v. *W. & A. Fletcher Co.*, 3 Cir., 20 F.2d 465, 468; *Boyd* v. *Bell*, 68 Ariz. 166, 203 P.2d 618, 626; *Northwest Casualty Co.* v. *Legg*, 91 Cal. App. 2d 19, 204 P.2d 106, 109 ("one or more"); *Iowa-Illinois Gas & Electric Co.* v. *City of Bettendorf*, 241 Iowa 349, 41 N.W.2d 1; *Lambert* v. *New England Fire Ins. Co.*, 148 Me. 60, 90 A.2d 451, 455; *State* v. *Hawk*, 360 Mo. 490, 228 S.W.2d 785, 788; *Pursley* v. *Inman*, 215 S.C. 243, 54 S.E.2d 800; *Doherty* v. *King*, (Tex. Civ. App.) 183 S.W.2d 1004, 1007; *State* v. *Brotherhood of Friends*, 41 Wash.2d 133, 247 P.2d 787, 794.

II.

Court Followed Clearly Erroneous Rule Laid Down by This Court.

The opinion clearly shows that the court below followed the "clearly erroneous" rule laid down by this court. No further discussion seems warranted.

CONCLUSION.

We respectfully submit that the petition for certiorari does not present a case falling within Rule 19 and that it should be denied.

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APPENDIX A.

Rule VII in Bankruptcy of the United States District Court for the District of Kansas, Adopted December 1, 1949.

A petition for review shall be filed with the Clerk of the Court, together with proof of service of a copy thereof upon the adverse parties who were represented at the hearing. The petition shall set forth the order complained of and the alleged errors in respect thereto. It shall contain a summary and short statement of the matters involved, with proper references to documents in the files, and, where a question of fact is involved, a concise statement of the evidence relating thereto, with appropriate references to the transcript. A supporting brief may be annexed to the petition, but it shall be direct and concise. The adverse party shall have ten days from the date of the service of the petition for review to file an answer thereto, which answer must be concise, and a supporting brief may be annexed thereto. The clerk shall forthwith transmit the petition for review and the answer thereto to the Judge. No certificate of the Referee shall be necessary, except on the order of the Judge. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the Referee or by a Judge upon such terms as will protect the rights of all parties in interest.